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SOL (MSHA) V. OZARK LEAD
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

OZARK LEAD COMPANY,
RESPONDENT

Civil Penalty Proceedings

Docket No. CENT 81-102-M
A.C. No. 23-00458-05016

Docket No. CENT 81-133-M
A.C. No. 23-00458-05017

Frank R. Milliken Mine and Mill

DECISION

Appearances: Robert S. Bass, Esq., Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri,
for Petitioner
Gerard T. Carmody, Esq., Bryan, Cave, McPheeters
& McRoberts, St. Louis, Missouri, for Respondent

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging 10 violations of mandatory standards. The general issues are whether the Ozark Lead Company (Ozark) has violated the regulations as alleged in the petitions filed herein, and, if so, the appropriate civil penalties to be assessed for the violations.

Contested Citation

Citation No. 543834 charges a violation of that part of the mandatory safety standard at 30 C.F.R. 57.3-22 that provides that "[l]oose ground shall be taken down or adequately supported before any other work is done." The citation reads as follows:

Loose was observed in the back in the L-1 213-6775 heading. Mucking had progressed beyond the loose toward the face creating a hazard for persons working or walking under it. The amount of loose involved was sufficient enough to cause serious injury.

It is not disputed that during the course of a regular inspection of the Frank R. Milliken Mine on July 30, 1980, MSHA inspector William Burich observed a mass of loose, unconsolidated material in the brow of the cited heading. The material was discolored and whitish in appearance indicating to Burich that it had been dried out for a period of between 4 hours to 24 hours. There were also cracks in the material. Burich concluded that it was just "waiting to fall." There was also a muck pile at the face of the cited heading and tire tracks leading to that muck pile but there were no miners in the immediate area and no other evidence that any work was underway. Burich did not know when anyone had last worked in the subject heading and did not bother to inquire. He nevertheless issued the citation based solely on the speculation that the tire tracks demonstrated that work had taken place in the cited heading after the "loose" had been created. Burich had also been informed (though the operator now contends, erroneously) that the cited heading was among those considered "active" and there were no signs, barricades, or other indication to suggest that the cited entry was inactive or off-limits.

Barry Conway, the mine foreman in charge of the cited area, testified that the subject heading was indeed considered by him to have been "inactive" as of July 18, 1980. He admitted, however, that neither the general mine map nor any other official document reflected this status even as late as July 30, 1980, the date of the inspection, and that not even Company Safety Inspector Roderman or mine foreman, Ron Thomas, were told of the closing. Conway further admitted that no physical evidence existed to show that the subject heading was "inactive" and that nothing would have prevented an employee from entering that heading. Conway testified that as of July 18, 1980, he had not observed any "loose" in the heading. Conway admitted, however, that blasting had thereafter continued in the general vicinity of the cited area and, on at least one occasion, only 35 feet from the cited loose. This blasting continued until July 24, 1980. Conway admitted that a reasonably prudent mine foreman would have barricaded an inactive area such as the heading at issue.

Since it is undisputed that the cited "loose" did in fact exist, the specific question to be decided is whether that "loose" was "taken down or adequately supported before any other work [was] done" within the requirements of the cited standard. In this regard, I find the Secretary's case to be lacking. The Secretary's own evidence shows that the "loose" had existed for not more than 24 hours before its discovery by Inspector Burich around 1:30 on the afternoon of July 30, 1980, and no credible evidence exists to show that any work had been performed in that section of the mine during that period of time. Indeed, the only credible evidence of work performed in that area was shown by company records to have been performed on July 24, 1980--5 days before the "loose" would have even existed. Evidence that tire tracks and a muck pile existed in the cited entry without evidence establishing the time at which they were placed there does not of course prove that work had been performed in the cited entry after the "loose" had come into existence. While a

clearly dangerous condition did in fact exist here, under the unique facts of this case I can find no violation of the particular standard that was cited. The citation must accordingly be vacated.

Proposal for Settlement

In an amended joint motion to approve settlement filed at hearing, the parties requested the disposition noted below. Sufficient evidence has been presented, including evidence relating to the criteria set forth in section 110(i) of the Act, from which I am able to determine that the proposed settlement is appropriate. The motion is accordingly approved.

ORDER

Docket No. CENT 81-102-M

Citation No. 543834 is VACATED. The Ozark Lead Company is ORDERED to pay a civil penalty of \$320 within 30 days of the date of this decision, to be apportioned as noted below:

Citation No.	Date	Standard	Original Assessment	Approved Settlement Amount
544407	07/29/80	57.14-1	\$52	\$45
543835	07/31/80	57.15-5	78	78
544608	07/31/80	57.9-54	66	50
543836	08/05/80	57.6-57	98	98
544408	08/05/80	57.14-1	98	49

Docket No. CENT 81-133-M

Citation Nos. 543846 and 543848 are VACATED. The Ozark Lead Company is ORDERED to pay a civil penalty of \$170 within 30 days of the date of this decision, to be apportioned as noted below:

Citation No.	Date	Standard	Original Assessment	Approved Settlement Amount
543845	10/28/80	57.11-1	\$ 66	\$ 48
543849	10/27/80	57.6-106	122	122

Gary Melick
Administrative Law Judge